



**Federal Communications Commission
Washington, D.C. 20554**

March 31, 2010

DA 10-579

In Reply Refer to:

1800B3-SS

Released: March 31, 2010

Mr. Richard Dean Hodson
Hodson Broadcasting
520 Monticello Drive
Las Vegas, NV 89107

In re: **KHOD(FM), Des Moines, NM**
Facility ID No. 165982

File No. BSTA-20081229ACK
Request for Special Temporary Authorization
Petition for Reconsideration

File No. BMPH-20090209ABC
Minor Modification Application
Petition for Reconsideration

Dear Mr. Hodson:

We have before us a Petition for Reconsideration ("STA Petition") filed on May 19, 2009, by Hodson Broadcasting ("Hodson"), directed to the staff action denying Hodson's December 29, 2008, request for Special Temporary Authorization ("STA Request") to operate new, unbuilt Station KHOD(FM), Des Moines, New Mexico (the "Station"), with facilities proposed in the referenced minor change application (the "Modification Application").¹ We also have before us a Petition for Reconsideration ("Application Petition") filed on July 13, 2009, seeking reconsideration of the staff's dismissal of the Modification Application.² For the reasons set forth below, we deny both the STA Petition and the Application Petition.

Background. Hodson was issued a construction permit in 2006 which authorized the construction of the Station to serve Des Moines, New Mexico, on Channel 287C (105.3 MHz), with an effective radiated power ("ERP") of 82 kW and an antenna height above average terrain ("HAAT") of 626 meters.³ The Permit bore an expiration date of June 28, 2009. On December 29, 2008, Hodson filed

¹ See *Letter to Hodson Broadcasting, Audio Division, Media Bureau* (rel. Apr. 17, 2008) ("STA Denial Letter").

² See *Letter to Hodson Broadcasting, Audio Division, Media Bureau* (rel. Jun. 18, 2009) ("Application Dismissal Letter"). We note that an informal objection to the Application filed by Enchanted Air, Inc., licensee of KRTN(AM), Raton, New Mexico, was dismissed as moot in the *Application Dismissal Letter*.

³ File No. BNPH-20060309ADA ("Permit").

the STA Request to operate the Station with temporary facilities from a location at Raton, New Mexico.⁴ The Modification Application proposing a relocation from Des Moines, New Mexico, to Raton, New Mexico, was filed seven weeks later.⁵ In the *STA Denial Letter*, the staff found that Hodson had sought to implement a change in community of license and initiate a new FM service via the STA Request. The staff denied the STA Request, stating that an STA was not the appropriate vehicle for the establishment of new broadcast service and that an STA grant would circumvent the two-step construction permit and license process which is mandated by the Communication Act of 1934, as amended (the “Act”).⁶ The staff further stated that Hodson had failed to demonstrate that the public interest would be served by the grant of an STA.

Hodson filed the STA Petition on May 19, 2009, arguing that he believed an STA Request was the best way to address the necessity of testing older transmission, antenna, emergency alert system (“EAS”), and audio modulation equipment. Hodson added that if he was incorrect in filing an STA Request, the staff should provide Hodson, which characterizes itself as a small “designated entity,” with reasonable alternatives and viable suggestions to assure compliance before the Permit expires.⁷

On June 18, 2009, the staff dismissed the Modification Application because it would not result in a preferential arrangement of allotments, as required by the Commission’s *Community of License Report and Order*.⁸ The *Community of License R&O* states that, in evaluating community change applications, the staff must compare the existing arrangement of allotments with the proposed arrangement of allotments. In this case, the staff compared a second local service at Des Moines⁹ under Priority (4) with a sixth local

⁴ In the STA Request, Hodson acknowledges that “variances from the current CP authorization include reduced ERP, community of license modification, plus transmitter and antenna relocation.” STA Request at 1. It also:

proposes to commence STA operations on January 2, 2009, and terminate on or before June 28, 2009, at which time Hodson is expecting to file either a license to cover (FCC Form 302-FM) or program test authority on a modified KHOD construction permit (“CP”) which Hodson tentatively plans to file on or around May 1, 2009, after the appropriate engineering is accomplished and technical numbers can be gathered for accurate and correct modification of KHOD’s CP.

Id.

⁵ We note that in response to numerous interference complaints, the Commission’s Enforcement Bureau investigated the Station’s operation on June 24, June 25, and July 1, 2008, and observed that it was being operated without authorization at Raton. On November 10, 2009, the Enforcement Bureau issued a Forfeiture Order upon Hodson in the amount of \$20,000 for willfully and repeatedly operating the Station at variance from its authorization at Des Moines. See *Hodson Broadcasting*, Forfeiture Order, 2009 WL 3749398, DA 09-2402 (EB rel. Nov. 13, 2009).

⁶ *STA Denial Letter* at 1; see also 47 U.S.C. § 319.

⁷ STA Petition at 4.

⁸ *Application Dismissal Letter* at 1, citing *Modification of FM and TV Authorizations to Specify a New Community of License* (“*Community of License R&O*”), Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990).

⁹ Noncommercial education (“NCE”) Station KENU(FM) is licensed at Des Moines.

service at Raton, finding that retaining a station licensed to Des Moines resulted in a preferential arrangement of allotments.¹⁰

Hodson filed the Application Petition on July 13, 2009, arguing that the *Application Dismissal Letter* did not consider the arguments made in Hodson's "Motion for Support for Minor CP Modification and Dismissal of Informal Objections" (the "Motion"), attached to the Application, as amended on June 2, 2009.¹¹ The Application Petition reiterates the arguments raised in the Motion and contends that because Hodson qualifies as a "designated entity,"¹² the Commission can achieve broadcast localism, diversity, and competition, which he argues are all in the public interest, by reinstating and granting the Modification Application.

Discussion. Reconsideration is appropriate only where the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.¹³

STA Petition. The Act states that STAs may be issued where there are "extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest."¹⁴ Hodson states that as a designated entity, he must "do all the legal and engineering aspects involved with constructing a new FM broadcast facility without assistance."¹⁵ Hodson's decision to prosecute the Application on a *pro se* basis is a private business decision. This is not an "extraordinary circumstance" warranting an STA.¹⁶ Hodson

¹⁰ *Application Dismissal Letter* at 2.

¹¹ In the Motion, Hodson argues that when the Commission comprehensively considers Section 307(b) issues, it must evaluate permit or license modifications fairly, efficiently and equitably, "utilizing a multifaceted, flexible approach toward applicants." Motion at 2. Hodson argues that its relocation and downgrade would be in the public interest, because the authorized Class C facilities at Des Moines cannot be constructed in the time remaining on the permit, while the proposed Class A facility at Raton could be constructed and become operational by the permit expiration date. *Id.* at 12. We note that the Motion also addresses arguments raised against the Application in an informal objection filed by Enchanted Air, Inc. – however, in the *Application Dismissal Letter*, the staff dismissed this informal objection as moot. *See id.* at 3-6; *see also* n.2, *supra*.

¹² Designated Entities are small businesses as defined by the Small Business Administration and having less than \$6 million in annual receipts, businesses owned by members of minority groups and/or women, and rural telephone companies. *See* 47 C.F.R. § 1.2110(a); *see also* 15 U.S.C. § 632(a)(1).

¹³ *See* 47 C.F.R. § 1.106; *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966); *National Ass'n of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

¹⁴ 47 U.S.C. § 309(f); *see also Scott Cinnamon, Esq.*, Letter, 24 FCC Rcd 5203 (MB 2009).

¹⁵ STA Petition at 3.

¹⁶ *See Chameleon Radio Corporation*, Order to Show Cause, Hearing Designation Order, and Notice of Apparent Liability, 11 FCC Rcd 11088, 11097 (1996) (In denying licensee's "extraordinary circumstances" claim, the Commission stated: "The public interest lies not with . . . [licensee's] private business interests . . . but with . . . [its station's] provision of service to its licensed community. . . .").

argues that he believed that an STA request “was the best venue to address the necessity of testing older transmission, antenna, EAS and/or audio modulation equipment.”¹⁷ We do not find Hodson’s arguments persuasive. As we have done in similar circumstances, we will deny Hodson’s attempt to misuse STA procedures to circumvent established licensing procedures.¹⁸ STAs are not granted for the purpose of testing equipment at unauthorized sites.¹⁹ Moreover, STAs are not issued for implementing a change in community of license. Hodson has also not made any showing of error in the *STA Denial Letter*, nor has he presented any new facts of which the staff was unaware at the time it made its decision to deny the STA Request. Hodson has likewise not presented any unusual circumstances that otherwise warrant reconsideration. We therefore deny the STA Petition.

Application Petition. In the Application Petition, Hodson reiterates his argument that Section 307(b) of the Act mandates that the Commission “fairly and flexibly provide equality of radio broadcasting service. . . .”²⁰ Specifically, he contends that he will advance these goals by providing the proposed community of Raton with its first 24-hour-a-day station; increased programming choices; diversity of ownership; and job creation.²¹ In addition, Hodson argues that moving the Station from Des Moines to Raton would not result in the removal of Des Moines’ sole local service,²² nor would it preclude future FM allotments to either Des Moines or Raton.²³ Hodson argues that as a new entrant qualifying as a designated entity, it is entitled to “some type of timely Commission relief.”²⁴ Finally, Hodson argues that his Motion “was swept under the carpet without attention or discussion of its historic and assertive [sic] [Section] 307(b) merits.”²⁵

¹⁷ STA Petition at 3.

¹⁸ See *Rancho Palos Verdes Broadcasters, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 18 FCC Rcd 5043, 5048 (2003) (noting, with approval, “a number of staff-level cases where specific STA requests were denied because it was determined that the applicant . . . was using the STA process to circumvent established modification procedures, enhance the facility or make operation more convenient for the broadcaster”).

¹⁹ A permittee may, upon notification to the Commission, conduct new station equipment tests pursuant to 47 C.F.R. § 73.1610.

²⁰ Application Petition at 5.

²¹ *Id.* at 4-5.

²² Application Petition at 5. Hodson states that Eastern New Mexico University has been issued an authorization (BPED-20071022BEA, granted on September 9, 2008) for a new NCE-FM station at Des Moines. See n.8, *supra*.

²³ Application Petition at 5. Hodson provides no technical data to support this statement, merely indicating that “both areas are too small and remote to register on Arbitron Radar, have numerous other FM channels available within their local spectrum, and could clearly be classified as ‘underserved’ communities.”

²⁴ Hodson cites the Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164 (“Regulatory Flexibility Act”), and Section 257 of the Telecommunications Act of 1996 (“1996 Act”), Pub. L. No. 104-104, 47 U.S.C. § 257(a) and (b).

²⁵ Application Petition at 7.

At issue in this application proceeding is whether a second local service in the less populated community of Des Moines (population 177) is preferred to a sixth local service²⁶ in the larger community of Raton (population 7,282). Each of these options implicates Priority (4) “other public interest matters.”²⁷

The Commission has stated that a comparison of proposals under Priority (4) may “take into account the number of aural services received in the proposed service area, the number of local services, the need for or lack of public radio service and other matters such as the relative size of the proposed communities and their growth rate.”²⁸ We find that under Priority (4), the staff’s dismissal of the Application is in the public interest. If relocated, the Station would serve approximately 7,000 more persons at Raton than it would at Des Moines. These potential listeners, however, are well served by other radio services, and therefore, this improvement is of limited benefit.²⁹ Relocation would leave the population of Des Moines with only one available local service. Although we have approved proposed allotments based on proposed service to a larger community under Priority (4), this occurred when the communities in question had a comparable number of transmission or reception services.³⁰ However, in this case, the differences between the number of transmission and reception services are substantial.³¹ The Station constitutes only the third reception service in Des Moines. In contrast, the proposed reallocation would result in a ninth reception service in Raton. Further, a community’s larger population does not necessarily require that an additional allotment be made at the larger community when the service levels are neither comparable nor abundant.³² Hodson’s reliance on its unique “24 hour live and

²⁶ FM commercial Stations KRTN-FM, KBKZ and AM Station KRTN are licensed at Raton, and Channel 205C1 and vacant Channel 248C1 are assigned to the community.

²⁷ See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1988) (“*FM Priorities*”). The FM allotment priorities are: (1) first fulltime aural (reception) service, (2) second fulltime aural service, (3) first fulltime transmission (local) service, and (4) other public interest matters.

²⁸ See *FM Priorities*, 90 FCC 2d at 92 n.8.

²⁹ The Commission deems five or more reception services “abundant.” See *Family Broadcasting Group*, Decision, 93 FCC 2d 771 (Rev. Bd. 1983), *rev. denied* FCC 83-559 (Nov. 29, 1995); see also *LaGrange and Rollingwood, Texas*, Memorandum Opinion and Order, 10 FCC Rcd 3337 (1995); *Louisburg and Hillsborough North Carolina*, Report and Order, 21 FCC Rcd 5062, 5063 (2006) (area “well-served with 5 or more full-time reception services”).

³⁰ See, e.g., *Hallie and Ladysmith, WS*, Report and Order, 10 FCC Rcd 9257 (MMB 1995) (local transmission service re-allocated from the smaller Ladysmith to the larger Hallie providing both communities with two local transmission services).

³¹ The reception services for Des Moines include the Station and Station KENU(FM), which are both authorized at Des Moines, and Station KRTN(FM), Raton, New Mexico. The reception services for Raton include Stations KRTN(FM), KRTN(AM) and KBKZ(FM), which are all authorized at Raton, and Stations KTDL(FM) and KCRT(FM), Trinidad, Colorado, KCCS(FM), Starkville, Colorado, a new FM construction permit for Channel 205C1 at Raton, and vacant FM Channel 248C1 at Raton.

³² See *Sumter, Orangeburg, and Columbia, SC*, Report and Order, 11 FCC Rcd 6376 (MMB 1996) (retention of Orangeburg’s (population 13,739) sixth station outweighed providing Columbia (population 98,052) with its fourteenth local transmission service); see also *Metropolis, IL, and Paducah, KY*, Report and Order, 15 FCC Rcd 11714, 11715 (MMB 2000) (where both communities received a comparable number of reception services, retention (continued . . .)

local” program service as an additional reason for the re-allotment of the Station to Raton, is misplaced. Program format choices are not relevant allotment considerations.³³ We therefore find that the staff’s decision is consistent with established Commission precedent

We disagree with Hodson’s unsupported allegation that the Section 307(b) arguments, among others, in his Motion were not considered. The staff’s analysis is not required to be of a minimum length.³⁴ The *Application Dismissal Letter* provides the specific grounds for dismissal, *i.e.*, violation of Section 73.3573(g)(1).³⁵ In any event, we have carefully considered the full record in this case and find no grounds to reinstate the Modification Application.

Hodson’s claim that as a “designated entity,” it is entitled to relief from compliance with the Rules and the Commission’s policies under the Regulatory Flexibility Act and Section 257 of the 1996 Act are misguided. The Regulatory Flexibility Act, as stated by Hodson, requires the Commission to consider the impact of rule making proceedings on defined “small entities.”³⁶ It does not apply in adjudicatory proceedings, nor does it require the Commission to grant an exemption from *existing* rules to designated entities. Similarly, Section 257 requires the Commission to identify and eliminate, *by regulation*, market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services. . . .³⁷ Neither Section

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of Metropolis’ (population 6,734) third station outweighed providing Paducah (population 27,256) with its sixth local transmission service).

³³ See, e.g., *Wilburton, Okeham, and McAlester, Oklahoma*, Report and Order, 21 FCC Rcd 5127 (MB 2006) (finding that a program format change by a “backfill” FM station is not a factor to be considered in an FM allotment proceeding).

³⁴ See *Wendell and Associates*, Memorandum Opinion and Order, 14 FCC Rcd 1671, 1679 (1998) (“It is clear from the staff’s order that it considered [the objector’s] pleadings, which is all that was required.”); see also *CMP Houston-KC, LLC*, Memorandum Opinion and Order, 23 FCC Rcd 10656, 10660 (2008).

³⁵ *Application Denial Letter* at 2.

³⁶ See 5 U.S.C. § 603(c). See also *Richard Hodson*, Letter, 19 FCC Rcd 18101, 18102 (WTB 2004) (rejecting argument by Mr. Hodson in an unrelated matter that the Regulatory Flexibility Act applies to individual requests to waive a final rule).

³⁷ 47 U.S.C. § 257(a) (emphasis added). We note that the term “designated entity” is generally not applied in the commercial broadcast licensing context. See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, First Report and Order, 13 FCC Rcd 15920, 15995 (1998) (finding the adoption of a “new entrant” bidding credit the most appropriate way to implement the statutory provisions regarding designated entities in the broadcast auctions context). The Commission also has established policies to promote small business ownership of broadcast stations by applicants that meet “eligible entity” criteria. See *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Notice of Proposed Rulemaking, *et al.*, 23 FCC Rcd 5922, 5925 (2008) (“*Diversity Order*”); *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Fifth Further Notice of Proposed Rulemaking, *et al.*, 24 FCC Rcd 13040, 13048 (2009); *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Fourth Further Notice of Proposed Rulemaking, *et al.*, 24 FCC Rcd 5896, 5906-07 (2009). See also, e.g., *Diversity Order*, 23 FCC Rcd at 5944 (2008) (assignment of grandfathered radio station combinations to eligible entities permitted). However, the Commission has neither (continued . . .)

257 of the 1996 Act nor the *Community of License R&O* compels us to grant a patently defective application based on an applicant's self-characterization as a "designated entity."³⁸

Conclusion/Actions. Accordingly, IT IS ORDERED, that the May 19, 2009, Petition for Reconsideration filed by Hodson Broadcasting IS DENIED.

IT IS FURTHER ORDERED, that the July 13, 2009, Petition for Reconsideration filed by Hodson Broadcasting IS DENIED.

IT IS FURTHER ORDERED, that, because the Hodson Broadcasting construction permit (File No. BNPH-20060309ADA) expired on June 28, 2009, the KHOD(FM) call sign IS DELETED. The Commission will modify its data bases to show the expiration of the permit.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

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adopted nor proposed different S. 307(b) standards for eligible entities proposing community of license modifications.

³⁸ See, e.g., *Richard Hodson*, Letter, 19 FCC Rcd 18101, 18102 (WTB 2004) (Section 257 of the Act does not compel grant of a waiver of Section 1.2106(a) of the Rules).